a **NON-METALLIC MINERAL PRODUCT MANUFACTURING UNION**

**v**

**KETUA PENGARAH KESATUAN SEKERJA MALAYSIA & ANOR**

b HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[ORIGINATING MOTION NO: 25-22-95]
12 MARCH 1996

c ***ADMINISTRATIVE LAW:*** *Certiorari – Mandamus – Whether decision-making process vitiated by jurisdictional error – Whether decision-making authority committed an error of law – Duty to act reasonably – Consideration of the Wednesbury principles.*

***INDUSTRIAL RELATIONS:*** *Workers Union – Application by Union for*
d *recognition of eligibility to represent workers – Statutory functions of the Director General of Industrial Relations and the Director General of Trade Unions – Whether clearly defined – Whether clothed with distinctive functions – Industrial Relations Act 1967 ss. 9(2), 9(3)(c), 9(4A), 9(4B)(b) – Trade Unions Act 1959 s. 26(3) – Industrial Relations Regulations reg.*
e *4(1)(c).*

***INTERPRETATION:*** *Sections 9(4A), 9(4B)(b) Industrial Relations Act 1967 – Regulation 4(1)(c) Industrial Relations Regulations – Recognition of workers Union – Statutory functions of the Director General of Industrial Relations and the Director General of Trade Unions – Whether clothed*
f *with distinctive functions.*

***WORDS & PHRASES:*** *"To resolve the matter" – "Competence of the trade union" – Industrial Relations Act 1967 ss. 9(4a), 9(4B)(b).*

g In this case, one Dawson Enterprise Sdn Bhd (the company) ran a factory in which the workers were engaged in the production of a certain non-metallic mineral product. In December 1992, pursuant to s. 9(2) Industrial Relations Act 1967 (the IRA), the applicant served a claim for recognition of the Union as eligible to represent the workmen employed in the company. The company in consequence applied to the Director General for Industrial Relations (the
h DGIR) under s. 9(3)(c) of the IRA for the latter to "ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned ...", whereupon the DGIR, acting under the relevant provisions of the IRA, the Industrial Relations Regulations 1980 (the IRR) and the Trade Unions Act 1959, requested the Director General of
i Trade Unions to make a decision on the competence of the applicant to represent the workers and secondly, to carry out a membership check in respect of the workers. The DGTU did not carry out a membership check as requested, but made a decision, nonetheless, that the applicant was not

competent to represent the workmen. Be that as it may, the decision of the DGTU was adopted by the DGIR and the applicant was accordingly informed that it was not competent to represent the workers.

The applicant took out a motion and applied for (i) a writ of *certiorari* to quash the decision of the DGTU and (ii) an order of *mandamus* to direct the DGIR to resolve the application for recognition by directing the DGTU to take the required action under reg. 4(1)(c) of the IRR (i.e. to carry out a membership check). The facts showed that both the DGTU and the DGIR, in deciding the way they did, had not given any reason for their respective decisions. Before the learned Judge, the main issues that arose were:

(i) whether in law, the statutory authority to make the decision on the question of recognition of the applicant as eligible to represent the workmen lied with the DGTU or the DGIR.

(ii) whether in the circumstances the DGTU's (and hence the DGIR's) decision was so unreasonable that *certiorari* and *mandamus* ought to issue.

**Held:**

**[1]** Judicial review is concerned not with the decision but the decision making process. The fundamental principle is that the Courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. The Courts, however, will not exercise jurisdiction unless substantial injustice has ensued or is likely to ensue.

**[2]** Section 9(4A) of the IRA imposes a statutory duty on the DGIR "to take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter". This duty is reinforced by reg. 4(1)(c) of the IRR which provides that "in carrying out his functions ... the DGIR may request the Registrar of Trade Unions to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition is made are members of the trade union making the claim". These apart, the DGIR's duty to expeditiously and fairly resolve the matter is fortified by the preamble to the IRA.

**[3]** The word "resolve" in s. 9(4A) of the Industrial Relations Act 1967 implies an element of finality. Thus, in so far as the question of recognition of the union is concerned, only the DGIR is empowered to decide.

**[4]** Under s. 9(4B)(b) of the IRA, however, the DGIR "may refer to the Registrar of Trade Unions for *his decision* any question on the *competence of the trade union* of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought

to be accorded ...". Thus while s. 9(4A) empowered the DGIR to decide on the issue of recognition, s. 9(4B)(b) allowed the DGTU to decide on the question of "competence of the trade union ..."

**[5]** It follows that s. 9(4B)(b) of the Industrial Relations Act when read with s. 4(1)(c) of the Industrial Relations Regulations indicates that the duty of the DGTU is to verify and ascertain the membership registration of the union claiming recognition and to report and make his recommendation to the DGIR on whether the trade union concerned is competent to represent any class of workmen in the company concerned. Compared to the DGIR, who is a decision-making authority, the DGTU is merely a verifier, a reporter and a recommender.

**[6]** The DGTU had not shown that he had carried out a membership check which he was specifically required to do, but on the contrary, had apparently, in effect, decided on the question of recognition of the Union in the absence of statutory empowerment for him to do so. By deciding upon recognition the DGTU had committed an error of law in that he had usurped the functions of the DGIR. Alternatively, however, if the DGTU had not decided on recognition, then the issue is still left unresolved as the DGIR himself had not made any decision.

**[7]** The law requires that the records must show the basis of the DGTU's decision or how he arrived at the decision following his investigation under s. 9(3)(c) and it is sufficient if broad grounds are given. The records showed that the DGTU had not indicated any reason for his said decision.

**[8]** The DGIR had also committed a jurisdictional error in his interpretation and implementation of the law as he failed "to resolve the matter" by deciding whether or not the applicant Union could be accorded recognition as required of him under s. 9(4A) of the IRA. On the facts, the DGIR acted only as a "postman" as he had merely conveyed to the applicant the DGTU's decision on competency, which, apparently to the DGIR, was tantamont to recognition, when the issue of recognition ought to have been exclusively decided by him alone.

**[9]** Though in exercising his functions under para. 4(1)(c) of the IRR, the Registrar of Trade Unions has an unfettered discretion, he is subject to a duty to act responsibly in the *Wednesbury's* sense (i.e *Associated Provincial Picture Houses v. Wednesbury Corporation).* It is quite obvious that the DGTU in the instant case had run foul of this principle.

**[10]** The applicant Union is entitled to rely on the principle of legitimate expectation to support their application for judicial review. Clearly, the applicant had a legitimate expectation that, in the event of the company wanting an ascertainment of whether or not the majority of its workmen were members of the applicant Union, the DGTU is expected by both

the company and the applicant to conduct a membership check if at all he could in the position to make his recommendation on the question of competency of the applicant union.

**[11]** The DGIR and the DGTU had committed an admixture of fundamental jurisdictional errors in their construction (especially on their distinctive roles) and respective implementation of the law in their decision-making process on the recognition of the applicant Union.This has caused substanstial injustice to the applicant. *Certiorari* must therefore go to quash the decision of the DGTU and the DGIR, and the DGTU must be directed to act according to the law as postulated herein.

*[Application for certiorari and mandamus allowed. Order accordingly]*

**Cases referred to:**

*Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor. [1980] 2 MLJ 199* ***(refd)***

*Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155* ***(refd)***

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947] 2 All ER 680* ***(refd)***

*Page v. Hull University Visitor [1993] 1 All ER 97* ***(refd)***

*Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union [1995] 2 CLJ 748; [1995] 2 MLJ 317* ***(refd)***

*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor. [1995] 3 MLJ 369* ***(refd)***

*Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308* ***(refd)***

*Sangram Singh v. Election Tribunal AIR 1955 SC 425* ***(foll)***

*Kewal Krishnan v. Minister for Local Bodies & Ors. AIR 1959 J & K 17* ***(foll)***

*Regina v. Race Relations Board, ex parte Selvarajan (CA) [1975] 1 WLR 1686* ***(foll)***

*Tanjong Jara Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1987] 1 MLJ 124* ***(refd)***

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223* ***(refd)***

*JP Berthelson v. Director General of Imigration, Malaysia & Ors. [1987] 1 MLJ 134* ***(cit)***

*McInnee v. Onslow-Fane [1978] 3 All ER* ***(refd)***

*Findlay v. Secretary of State for the Home Department [1984] 3 AER 801* ***(foll)***

**Legislation referred to:**

Industrial Relations Act 1967, ss. 9(1), (2), (3)(a), (b), (c), (4A),(4B), (b)
Industrial Relations Regulations 1980, reg. 4(1)(c)
Trade Unions Act 1959, s. 26(3)

**Other sources referred to:**

*Doctrine of Legitimate Expectation,* Peter Leyland, Terry Woods & Janetta Harden, pp. 202-204

*The New Shorter Oxford English Dictionary,* 1993 Edn.

*New Law Journal,* Rabinder Singh (Gray's Inn), 9 September 1994, p. 1215

*For the applicant - N Shanmugam; M/s. Shan & Gooi*
*For the respondents - Zarina Zahur; Federal Counsel*

**JUDGMENT**

**Vincent Ng Kim Khoay J:**

This was a Notice of Motion (encl. 11) filed by the applicant union, Non-Metallic Mineral Products Manufacturing Employees Union, in which they had sought the following reliefs: (i) for a writ of *certiorari* to be issued to remove to this Court for the purpose of quashing the decision of the first respondent, the Director General of Trade Unions (DGTU), dated 19 December 1994 which states that the applicant is not competent to represent the employees of Syarikat Dawson Enterprise Sdn. Bhd. (the company); (ii) for an order of *mandamus* to direct the second respondent, the Director General for Industrial Relations (DGIR) to resolve the application by the applicant for recognition by directing the DGTU to specifically take the required action under reg. 4(1)(c) of the Industrial Relations Regulations 1980 (lRR); (iii) for consequential directions; and (iv) for costs. The background of the case is as follows.

The applicant is a registered union and its membership is open to all employees in companies and other commercial concerns engaged in the manufacture of non-metallic mineral products.

Rule 3 of the applicant's Rules and Constitution states that membership of the union shall be open to all employees other than those employed in the managerial, executive, confidential and security capacities.

Dawson Enterprise Sdn. Bhd. runs a factory at Lot 267, Jalan Perusahaan 6, Kawasan Perindustrian Prai and the workers in this factory are engaged in the production of spun piles which are non-metallic mineral products.

In December 1992, the applicant served on the company, pursuant to s. 9(2) of the Industrial Relations Act 1967 (IRA), a claim for recognition of the union as eligible to represent the workmen employed in the company. In response to this application the company made an application to the DGIR under s. 9(3)(c) of the IRA, the crux of which provision reads "to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned." which is couched in strikingly similar terms to reg. 4(1)(c) of the IRR. The said letter dated 21 December 1992 is reproduced follows:

DAWSON ENTERPRISE SDN. BHD
Lot 267 Jalan Perusahaan Enam
Kawasan Perindustrian Prai
13600 Prai

**Registered**

Received
24/12/92

Our Ref: PRAI/KESATUAN/92(2)
Date: 21st Disember, 1992

Setiausaha
Kesatuan Sekerja Pembuatan Barangan
Galian Bukan-Logam (NMMPMEU)
99-A Jalan SS 14/l
Subang Jaya
47500 Petaling Jaya
Selangor Darul Ehsan

Sir

**Re: Claim For Recognition**

Your letter dated 4th December 1992 on the above refers.

We wish to inform you that we have made an application to the Director-General of Industrial Relations under s. 9(3)(c) of the Industrial Relations Act, 1967.

We will revert to you when we hear from the Director-General.

Thank you.

Yours faithfully,

Dawson Enterprise Sdn. Bhd.

sgd.
Authorised Signatory

c.c. 1. Ketua Pengarah
Jabatan Perhubungan Perusahaan (HQ)
2. Tuan Ketua Pengarah
Jabatan Hal Ehwal Kesatuan Sekerja (HQ)
50542 KUALA LUMPUR
3. Tuan Pengarah
Jabatan Perhubungan Perusahaan P. Pinang 10300 PULAU PINANG

SB/nk

For reasons that will be explained later, it is important to note that the company had stated in the letter of 21 December 1992 that they had made the application under s. 9(3)(c) of the IRA which, in turn, is governed by s. 9(1).

Then, at the request of the DGIR the applicant sent a list of members it recruited, and the DGIR by a letter dated 15 February 1993 requested the DGTU to do two things, namely:

(i) to make a decision on the competence of the applicant to represent the workers of the company under s. 9(4B)(b) of the IRA; and

(ii) to carry out a membership check under reg. 4(1)(c) of the Industrial Relations Regulations 1980 (the IRR).

Responding to that request, by a letter of 18 May 1993, the **Deputy** DGTU decided that the applicant was not competent to represent the workers of the company. This decision of the Deputy DGTU became the subject matter of an application by the applicant for an order of *certiorari* in the Penang High Court Originating Motion No. 25-35-93, in which the DGTU was cited as the first respondent and the Deputy DGTU as the second respondent. On 10 May 1994 Azmel J quashed the decision of the Deputy DGTU and directed the DGTU to make a decision. The major proposition canvassed in that case was that the decision had to be made by the DGTU himself and that function under s. 9(4B)(b) of the IRA could not be delegated to any other officer. This proposition superseded all other issues and was sufficient by itself to have the decision of the Deputy DGTU quashed. Pursuant to the High Court Order of 10 May 1994, the DGTU, by a letter dated 19 December 1994 made the decision that the applicant was not competent to represent the workers of the company. He did not carry out any membership check.

The issue raised by the applicant in this case is that the DGIR was only required by the company to ascertain whether or not the workers were members of the applicant seeking recognition. This was so, considering the fact that the application by the company to DGIR was made under s. 9(3)(c) of IRA, which provision clearly requires the DGTU to ascertain whether or not the workmen in respect of whom the claim for membership is made, are members of the trade union making the claim. It was further submitted by Counsel for the applicant, Mr. N. Shanmugam, that as s. 26(3) of the Trade Unions Act 1959 (TUA) clearly empowers the DGIR to direct the DGTU to carry out a membership check, this provision would further serve to confirm the requirement that membership check would have to be conducted, if at all the question of competency for recognition could be decided by DGTU. And, the incontrovertible fact in this case is that the company (Dawson Enterprise) had required a membership check or confirmation, as the application was made under s. 9(3)(c).

Federal Counsel however took the stand that the DGIR is empowered to refer the issue of competency to the DGTU regardless as to whether the employer/ company raised the issue or not, and if referred, the DGTU is endowed - by virtue of s. 9(4B)(b) of IRA - with ample jurisdiction to decide on the competency of the trade union of workmen concerned. Thus, both the DGIR and DGTU have complied with the substantive provisions of subsections (1), (3), (4), (4A) and (4B)(b) of s. 9 of IRA.

It is unnecessary here to regurgitate, rediscuss or re-expound trite law, which makes for tedious reading, especially nowadays, when the time of a legal practitioner or Judge - on the threshold of the next millennium - is of the utmost essence. I shall first state pithily what has been considered settled law in applications for *certiorari*. An application for an order of *certiorari* is made by invoking the Courts' function of judicial review. A judicial review is unlike an appeal as there is clear distinction between an appeal and judicial review. (See *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower & Anor.* [1980] 2 MLJ 199).

Judicial review is concerned not with the decision but the decision making process. See *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155. The fundamental principle is that the Courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. This intervention by way of prohibition or *certiorari* is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in the *Wednesbury* sense, reasonably. (See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1947] 2 All ER 680). *Per Lord Browne-Wilkinson in Page v. Hull University Visitor* [1993] 1 All ER 97. If there is an error of law committed by a decision making authority or inferior tribunal in exercising a purely administrative or quasi-judicial function, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction, as it has no jurisdiction to commit an error of law. See *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 MLJ 317 and *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1995] 3 MLJ 369. And also, jurisdiction is exceeded where resort is had to the unfair procedure. (See *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308.)

Prerogative relief whether in the form of *certiorari* or prohibition are discretionary remedies and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-taker. Thus, jurisdiction will not invariably be exercised whenever there is an error of law. Though no limits can be placed upon the High Court's purely discretionary power, such discretion must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the Courts on

themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere error of law which do not occasion injustice in a broad and general sense. (See the passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429. See also *Kewal Krishnan v. Minister for Local Bodies & Ors.* AIR [1959] J & K 17.)

The crucial question for the Court to ask when deliberating the current application, is: who is clothed with the statutory authority to make the decision on the question of recognition of the union as eligible to represent the workmen employed in a company?

To arrive at a just decision here, let me first endeavour to unravel the occasional mystery in legislative intent, which in the instant case pertains to the respective statutory functions of DGIR and DGTU, resultant upon the interaction of the three connected pieces of legislation, namely the IRA, the TUA and the IRR.

**The Respective roles of DGIR & DGTU:**

Section 9(3)(c) of the IRA provides that **the employer** may:

> (c) apply to the Director General (defined as DGIR in s. 2 of IRA) **to ascertain** whether the workmen in respect of whom recognition is being sought **are members of the trade union** of workmen concerned and give a written notice of such application to such trade union of workmen.

And s. 9(l) states that a trade union of workmen **"the majority** of whose membership consists of workmen who are ... **may seek recognition** ...". The word "majority" connotes numbers and thus essentially entails the ascertainment of numbers required under s. 9(3)(c) above.

Under s. 9(4B)(b) of the IRA, the DGIR:

> (b) may refer to the Registrar of Trade Unions **for his decision** any question on **the competence** of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Registrar of Trade Unions under this paragraph shall be deemed, to be a performance of his duties and functions under the written law relating to the registration of trade unions.

Section 9(4A), appearing in Part III of the Act, clearly imposes a statutory duty on the DGIR "to take such steps or make such enquiries as he may consider necessary or expedient **to resolve the matter**". This is reinforced by reg. 4(1) of the IRR which also provides that "in carrying out his functions under Part III of the Act, the DGIR may at any time:

(a) xxxx

(b) xxxx

(c) request the Registrar of Trade Unions to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition is made are members of the trade union making the claim.

Notably, a strikingly similar provision recurs in s. 26(3) of the TUA.

The DGIR's duty to expeditiously and fairly resolve the matter is doubly fortified by the preamble to the IRA that encapsulates the aim and purpose of the IRA which, among other things, is to provide for the settlement of any differences or disputes between employers and workmen or their trade unions. See the observations made by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia Anor.* [1995] 3 MLJ 369, at pages 387 and 388. The word "competence" (in s. 9(4B)(b)) is defined as "legally qualified or eligible or permissible or able to take cognizance", and the expression "resolve" (in s. 9(4A)), as "an answer to a solution, determine (a doubtful point), settle (something) or decide on (a course of action etc.)" in the *New Shorter Oxford English Dictionar*y (1993 Edn.). Thus, the word "resolve" necessarily implies an element of finality. Thus, I would hold that in so far as the question of recognition of the union is concerned, only the DGIR is empowered to decide, whereas under s. 9(4B)(b) of the Act the Registrar of the Trade Union (or the DGTU) may only decide on the question of **"competence of the trade union** to workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded ...". In this regard, be it noted that the DGTU and the Registrar of Trade Union perform primarily the same functions. It would follow that, s. 9(4B)(b) of the Act when read with reg. 4(l)(c) of the IRR clearly indicates that the duty of the DGTU and the Registrar of Trade Unions is to verify and ascertainthe membership registration of the union claiming recognition and to report and make his recommendation to the DGIR on whether the trade union of workmen concerned is competent to represent any class of workmen in the company concerned. Though s. 9(4B)(b) is expressed as "refer to the Register of Trade Union for his decision," yet it is clear that such decision is restricted to the issue of competence of the trade union of workmen but not its recognition; this function clearly rests on the DGIR under the law. To state briefly, on the issue of recognition of the applicant union, the function of the DGIR is not that of a "postman" but a decision-making authority, whereas the DGTU is merely a verifier, a reporter and a recommender.

In recaptulation, the requisite statutory procedures involves two stages: the DGTU ascertains through membership check, decides and reports to the DGIR on the question of competency of the union; and the DGIR determines and resolves the question of recognition of the union. And I so hold.

***The error of law and jurisdiction committed:***

A perusal of the provisions of s. 9(3) of the IRA shows that in response to a union's claim for recognition, an employer (in this instance Dawson) has three options. It can accord recognition (see s. 9(3)(a)); or notify the union that it is not according recognition and state the grounds (see s. 9(3)(b)); or apply to the DGIR to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned, and give a written notice of such application to the trade union (see s. 9(3)(c)). Obviously by its letter of 21 December 1992 the company had opted to respond under s. 9(3)(c), when it sought an ascertainment that the workmen are members of the union. However, notwithstanding whether Dawson had opted under s. 9(3)(b) or 9(3)(c) of the IRA, the DGIR is nonetheless under a statutory duty imposed on him under s. 9(4A) of the IRA "to take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter."

Further, if the company had wanted to question the competence of the applicant to represent its workers for reasons other than whether or not the majority of its workmen were members of the union, then it would have opted under s. 9 (3)(b) and written to the applicant directly to say that it was not according recognition, and furnished the grounds therefor.

In the case before this Court, the DGTU had not shown that he had carried out a membership check which he was specifically required to do, but on the contrary, had apparently, in effect, decided on the question of recognition of the union in the abbence of statutory empowerment for him so to do.

His function is to decide on the competency of the applicant to represent workman in the company based on the membership check that he was clearly required by DGIR to conduct in respect of the workers of the company, but he was not to decide on the issue of recognition. Hence, if he had decided upon recognition he had committed an error of law by having in effect usurped the functions of DGIR. And, alternatively, if he had not decided on recognition then this issue is still left unresolved as the DGIR himself had not made any decision.

The applicant's second contention is that the letter dated 28 December 1994 by DGIR to the company and the applicant informing the latter that it was not competent to represent the workers, did not give any reasons as to how that decision was arrived at. According to Federal Counsel, the DGIR is under no legal duty to give reasons for his decision, as there is no provision under the IRA and the TUA requiring the DGIR to give his reasons.

In my considered view, law requires that the records must show the basis of the DGTU's decision or how he arrived at the said decision following his investigation made pursuant to s. 9(3)(c). In this regard reference may be made

to the case of *Regina v. Race Relations Board, ex parte Selvarajan* (CA) [1975] 1 WLR 1686 @ 1694 wherein the learned Judge held "Suffice it if broad grounds are given". Thus, if the DGTU had in fact merely decided on the question of competence and not recognition, yet, from the records, he did not even condescend to indicate any reasons for such decision; though he need not give detailed reasons. As the DGIR had required the DGTU to also carry out a membership check under reg. 4(l)(c) of the IRR, he is expected to state the results of his membership check so as to evince or make manifest the basis for his recommendation on the question of competency, had he in fact conducted such membership check.

Surely, in the interest of good industrial relations this Court cannot condone a situation where the record disclose that cryptic or capricious decisions may appear to have been made by the Director General of Trade Union even if such decision pertain only to the question of competency of the Trade Union. In this regard it is also noted that, unfortunately, a printed format was used by the DGIR in his letter of 15 February, 1993 to the DGTU which did not make clear to the DGTU that he was to make a decision only on the **competency** of the trade union pursuant to s. 9(4B)(b) of the IRA, and also, most importantly, that such decision should be based on the result of a membership check on the workmen in the company.

The DGIR had also committed a jurisdictional error in his interpretation and implementation of the law when he failed "to resolve the matter" by deciding whether or not the applicant union could be accorded recognition as required of him under s. 9(4A) of the IRA. Indeed, the facts in this case disclose that he had acted merely as a "postman" on both occasions: that is, on 18 May 1993, which resulted in his decision being quashed under O.M. 25-35-93 and on 28 December 1994, when he wrote again to the applicant with similar advice that the DGTU had decided that the applicant was not competent to represent the workers employed by the company at the factory. I say that he had acted as a postman on both occasions because he had merely conveyed to the applicant the DGTU's decision on competency - which, apparently to the DGIR, was tantamount to recognition - when the issue of recognition ought to have been exclusively decided by him alone. A further point is that, as the role of the DGIR here is largely administrative he has therefore no jurisdiction to commit an error of law. See also the case of *Syarikat Kenderaan Melayu Kelantan* discussed below.

Counsel for the respondent had also cited the judgment of Eusoffe Abdoolcader SCJ in *Tanjong Jara Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] 1 MLJ 124 in support of her contention that DGTU had acted within the law as he had unfettered discretion once an issue is referred to him under s. 9(4B)(b) of IRA. In my view this authority is of no assistance to the respondent's cause. It is abundantly clear that the *Tanjong Jara* decision postulated *inter alia* three principles, namely:

(i) though in exercising his functions under para 4(1)(c) of the IRR, the Registrar of Trade Unions has an unfettered discretion (be it noted that the discretion is on competence but not recognition), he is subject to a duty to act responsibly. Thus, if he come to a decision on no evidence or comes to an unreasonable finding - so unreasonably that a reasonable person would not have come to it - then the Courts will interfere;

(ii) Section 9(4B)(b) of the Act empowers the DGIR in carrying but his finding under sub-section (4A) of s. 9 "to resolve the matter" by referring to the DGTU for his decision, only the issue of "competence of the Trade Union" of workmen concerned to represent any workmen,

(iii) Para 4(1)(c) is only a procedural provision to enable the DGIR to implement the substantive provision enacted in s. 9(4A) of IRA. This was how his Lordship had put it (see p. 129 at H - Rt. Column of the report):

> In exercising his functions in this regard, the Registrar had an unfettered discretion which was subject to a duty to act responsibly in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*), that is to say, if a decision-making body comes to its decision on no evidence or comes to an unreasonable finding - so unreasonable that a reasonable person would not have come to it - then the Courts will interfere.

And indeed on the question of whether the decision was made "on no evidence", it was the finding of Eusoffe Abdoolcader SCJ that the DGIR and DGTU had acted responsibly when his Lordship found thus:

> The affidavits of the Director General, the Deputy Registrar of Trade Unions, who was acting Registrar at the material time and the first respondent all disclose that the latter had acted fairly, properly and reasonably in the exercise of his broad discretion in the matter under s. 9(5) of the Act and has taken all relevant matters into consideration and had sufficient evidence and material evidence before him for the purpose of arriving at his decision to accord recognition to the second respondent.

In our instant case, it is quite obvious the DGTU had run foul of the principle (i) above in *Tanjong Jara*. It is thus my view that, though there is no provision or requirement for the DGTU or the Registrar to conduct an enquiry pertaining to competency and his judgment would appear to be unfettered, yet he is subject to a sense duty to act responsibly in the *Wednesbury* sense (*see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223), and not come to his decision on no evidence as has apparently occurred here. It is thus necessary for the DGTU in the current case to manifest some evidence that he had arrived at a fair and reasonable decision, consistent with the maintenance of industrial harmony that he is duty-charged with by Parliament in enacting the law pertaining to workmen.

***The Doctrine of Legitimate Expectation***

The doctrine of legitimate expectation is of fairly recent origin to the law pertaining to judicial review and is an extension of the long-standing principle of natural justice. Locally it has been adopted in *JP Berthelson v. Director General of Immigration, Malaysia & Ors.* [1987] 1 MLJ 134. I may perhaps take the liberty to quote here the views expressed in the textbook on *Administrative Law* by Peter Leyland, Terrry Woods and Janetta Harden who had this to say on the Doctrine of Legitimate Expectation, at page 202 to 204:

> As we have seen, a more pragmatic idea of procedural fairness has been accepted by the Courts in place of the older, rigid dichotomies. One of the new developments following *McInnes v. Onslow Fane* (see below), has been the evolution of a doctrine of legitimate expectation. The term 'legitimate expectation' was (probably) first employed by Lord Denning in *Schmidt v. Secretary of State of Home Affairs* [1969] 2 Ch. 149, and it has since been widely adopted in a number of different contexts. Lord Roskill acknowledged in the *GCHQ* case that the concept is now firmly entrenched, that it is akin to the right to be heard, and that it can take many forms. Essentially, they may have a legitimate expectation of a particular type of treatment. If this expectation is not realised, it will be protected by judicial review proceedings. More particularly it applies where there is an undertaking or policy guideline which justifies a person expecting that they will be treated in a particular manner, so that they can be truly said to have a legitimate expectation.

In *McInnes v. Onslow-Fane* [1978]3 All ER 211, it was explained by Megarry V-C that in application cases, an applicant could expect that the board were adopting a fair procedure and were under a duty to reach an honest conclusion without bias, and not in pursuance of any capricious policy.

In *Findlay. v. Secretary of State for the Home Department* [1984] 3 AER 801, Lord Scarman (at page 830) says as follows:

> The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the Court to apply for judicial review. These two applicants obtained leave. But their submission goes further. It is said that the refusal to except them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt, provided always the adopted policy is a lawful exercise of the discretion conferred on him by the statute.

The operation and the different species of legitimate expectation have been extensively discussed by Rabinder Singh of Gray's Inn, London in the *New Law Journal* (9th September 1994) on Public Law, wherein he had also quite appropriately summarised the limitation on the application of the doctrine, as follows (at page 1215):

> Legitimate expectation cannot be used to defeat a duty which public law imposes on a body nor to extend the power of a public body beyond what legislation has prescribed but it can be used to ensure that an act which is *intra vires* is performed if the public body has given rise to a legitimate expectation that it will be. In other words, the Court cannot through the doctrine of legitimate expectation require a body to do what is prohibited by statute or confer upon it a power which statute has not given it. But it can use the doctrine to condition the way in which a power which undoubtedly exists will be exercised.

Using a similar approach as the House of Lords adopted in *Findlay's* case, when we pose the question of what the legitimate expectation of applicant union was, then, the answer simply and straightforwardly is that, in the event of the company wanting an ascertainment of whether or not the majority of its workmen were members of the applicant union, the DGTU is expected by both the company as well as the applicant to conduct a membership check if at all he could be in the position to make his recommendation on the question of competency of the applicant union.

In the event, after reading the written submissions and hearing Counsel on both sides, it was clear that both the DGIR and DGTU had committed an admixture of fundamental jurisdictional errors in their construction (particularly concerning their distinctive roles) and respective implementation of the law in their decision-making process on the recognition of the applicant union. This has caused substantial injustice to the applicant. Thus, *certiorari* must go to quash the decision of the DGTU, and I ordered accordingly in terms of prayers (i) and (ii) of encl. 11, with directions that the DGIR and DGTU shall respectively act according to the law as discussed above. Cost of the application was awarded to the applicant.

Reported by W.A. Sharif